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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ROBERT DUNNING, Defendant and Appellant.	B210214 (Los Angeles County Super. Ct. No. GA049284)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Reversed with directions.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court denied Daniel Dunning's application for release from commitment based on restoration of his sanity. We reverse and order the court to grant the application.

FACTS AND PROCEEDINGS BELOW

At the trial on Dunning's application for release from commitment, the People stipulated that as long as Dunning took his prescribed medication he was not a danger to society. The only issue before the court was whether Dunning would continue to take that medication.

The following facts are undisputed.

Dunning was first diagnosed as having bipolar disorder in the 1970's and given Lithium to control his manic syndrome. So long as he took the Lithium, Dunning functioned as a normal member of society. When he did not take the medication, he suffered delusions and became violent. This first occurred in the late 1970's when Dunning stopped taking his Lithium and assaulted his wife. No criminal charges were filed on that occasion. In 1996, Dunning again stopped taking his Lithium and attacked his wife. He was convicted of misdemeanor battery. The most recent incident occurred in 2002 when he stopped taking his medication and attacked his elderly father. Following the latter incident, Dunning pleaded guilty to elder abuse and making terrorist threats. The trial court found that Dunning was not sane at the time he committed these offenses and ordered him committed to the Department of Mental Health for a maximum period of 8 years, 8 months. Dunning was sent to Patton State Hospital pursuant to Penal Code section 1026.[1]

In January 2007, the court ordered Dunning transferred from Patton to the conditional release program (CONREP) operated by Gateways Satellite, a residential mental health facility. In December 2007, Dunning was transferred to a less structured board and care facility, Oxford Villa. He continued outpatient treatment at Gateways

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[1] All statutory references are to the Penal Code.

during the week and was permitted weekends outside Oxford Villa, which he usually spent with a close friend, Alice Mertell.

In July 2008, the court conducted a trial to determine whether Dunning should be released from commitment on the ground that his sanity had been restored "which means the applicant is no longer a danger to the health and safety of others due to mental defect, disease, or disorder. (§ 1026.2, subd. (e).)[2]

Dunning waived his right to a jury trial on the restoration of his sanity and the matter was tried to the court. At the commencement of the trial, the People stipulated that in his present medicated condition Dunning is not a danger to the health and safety of himself or others. The sole issue before the court was whether Dunning would continue to take his medication if he was released into an unsupervised environment. The evidence on this issue included written reports and oral testimony from two forensic psychiatrists who supported Dunning's application for release and a clinical social worker who opposed it. The court also heard testimony in support of Dunning's release from four of his friends and from Dunning. The court ruled that Dunning's sanity had not been restored and ordered that he remain in the Gateways outpatient treatment program.

Dunning filed a timely appeal. He contends that he established by a preponderance of the evidence that his sanity has been restored and that the court's refusal to grant his release from commitment was an abuse of discretion. We agree.

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2 Section 1026.2 states in relevant part: "(a) An application for the release of a person who has been committed to a state hospital . . . , as provided in Section 1026, upon the ground that sanity has been restored, may be made to the superior court of the county from which the commitment was made, either by the person, or by the medical director of the state hospital. . . . [¶] . . . [¶] (e) The court shall hold a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community. If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year. All or a substantial portion of the program shall include outpatient supervision and treatment. The court shall retain jurisdiction. The court at the end of the one year, shall have a trial *to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder.*" (Italics added.)

DISCUSSION

I. STANDARD OF REVIEW

A defendant seeking release from commitment on the basis of the restoration of his sanity bears the burden of proving by a preponderance of the evidence that he is either no longer mentally ill or not dangerous. (§ 1026.2, subd. (k).) Under this standard a defendant need not show that he is no longer insane. Rather, he is entitled to release if he proves by a preponderance of the evidence that "'in his present medicated condition'" he no longer "'represents a danger to himself or others'" and that "'[he] will continue to take his medication as prescribed, in an unsupervised environment.'" (*People v. Williams* (1988) 198 Cal.App. 3d 1476, 1479; and see CALCRIM No. 3452.)

Dunning contends that we should review the trial court's decision for abuse of discretion and the People do not disagree. The cases Dunning cites, however, *People v. Cross* (2005) 127 Cal.App.4th 63, 66 and *People v. Sword* (1994) 29 Cal.App.4th 614, 619, footnote 2, dealt with whether a mentally ill defendant should be granted outpatient status, not whether the defendant was restored to sanity. Other courts, reviewing the revocation of outpatient status, have applied the substantial evidence test. (*People v. DeGuzman* (1995) 33 Cal.App.4th 414, 420; *In re McPherson* (1985) 176 Cal.App.3d 332, 341-342.) The defendant's entitlement to a jury trial and the Legislature's requirement that the defendant prove that he is no longer dangerous "by a preponderance of the evidence" (§ 1026.2, subd. (k)) suggest to us that the standard of review is the substantial evidence test. As a practical matter, however, we would reach the same result under either test. To establish an abuse of discretion, Dunning must show that the court's decision exceeds the bounds of reason, all of the circumstances being considered. (*People v. Cross, supra,* 127 Cal.App.4th at p. 73.) Under that standard, the court abuses its discretion if "the factors cited by the trial court in denying appellant's application either are not supported by the record or are inadequate." (*Id*. at p. 75.) By the same token, if the factors the court relied on in denying the application are not supported by the record or are inadequate, the court's decision is not based on substantial evidence.

II. SUMMARY OF THE EVIDENCE AND THE COURT'S RULING

A. Testimony of Dr. Sanjay Sahgal in Support of Restoration of Sanity

Dr. Sahgal, a court appointed forensic psychiatrist, testified in support of Dunning's restoration of sanity. Sahgal stated that he had examined more than 300 individuals who claimed that their sanity had been restored and that he had rejected those claims in 75 to 80 percent of the cases. In preparing his evaluation in this case Sahgal met with Dunning three times, reviewed his records at Gateways and discussed his case with the clinical social worker who was treating him there, Diane Levy. Based on this research, Sahgal formed the opinion that Dunning's bipolar disorder was in complete remission, would remain in remission so long as Dunning continued to take his medication and all signs pointed to Dunning's continued use of his medication.

Sahgal acknowledged that "nobody can predict the future," and that there was "some risk" that Dunning would stop taking his medication. Nevertheless, he believed that Dunning had "reduced his risk to probably the maximum extent that one can reduce it." Sahgal placed Dunning in the "lowest risk group" because, among other positive indicators, for the past five years "he has taken his medications regularly." This included the past seven months when Dunning was living in a board and care home where it was up to him whether to take his medication or not. In addition, Sahgal testified, Dunning "has expressed insight into his mental illness and his need for ongoing treatment. He has presented a viable relapse prevention plan including a specific doctor with whom he wants to consult. He has . . . not only express[ed] insight into his substance abuse problem, but has been remaining sober based upon random urine tests and voluntarily taking the bus during the day to attend more than the required number [of] A.A. meetings." Sahgal also considered as a positive factor Dunning's support system of friends who expressed their intention to keep him "on the straight and narrow.

When asked why he believed that Dunning would take his medication in the future although he had failed to do so in the past, Sahgal answered that "noncompliance with medication early on in the diagnosis of bipolar disorder is . . . unfortunately very

common" because the patient lacks insight into the cyclical nature of the illness. (Dunning's son confirmed that in the 1970's his father stopped his medication on several occasions "because he figures that he can get along without the medication.") As to the incident involving Dunning's father, Sahgal stated that the factors that were present then—"a very unusually stressful situation," alcohol abuse, and lack of insight into his illness—are no longer present. In addition, Sahgal explained, Dunning has had "five and a half years of not only treatment, but in Mr. Dunning's mind, of course, penalty." That penalty consisted not only of his "time and life circumstances" but his remorse over the attack on his father. In Sahgal's opinion, "regret would play a role" in keeping Dunning on his medication. Sahgal also pointed out that the new medication Dunning is taking "is usually better tolerated than Lithium which is what I think he was taking way back when. So at least in terms of side effects, I think it would be more likely that a patient would stay on them."[3]

In summary, Sahgal's report to the court listed seven "factors that suggested a reduced risk of dangerousness."

"1) Bipolar disorder is in complete remission;

"2) Alcohol abuse problem is in complete remission;

"3) He fully participates in his treatment program and takes his medications on a consistent basis;

"4) He has had no violent or dangerous behaviors during the past five years;

"5) He has articulated significant insight into his mental disorder, his need for continuing treatment, and the link between his mental illnesses and his past dangerous behaviors;

"6) He has articulated a reasonable and viable plan for relapse prevention and independent living;

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3 The doctors who examined Dunning testified he was taking Depakote. Dunning testified he was taking a closely related drug, Depakene. The active ingredient in both is valproic acid. This discrepancy did not enter into the court's decision.

"7) He has demonstrated successful functioning in a community living venue at which he has free access to the city, public transportation, etc."

B. Testimony of Dr. Kory Knape in Support of Restoration of Sanity

Dr. Knape, another court appointed forensic psychiatrist, agreed with Sahgal that if Dunning is released from commitment he "will be compliant with medications and psychiatric treatment in the community." Knape stated that he had evaluated "hundreds of restoration of sanity cases over the past 10 to 15 years." In 90 to 95 percent of the cases he has found the person has not been restored to sanity.

Knape testified that he was one of the court appointed psychiatrists who examined Dunning in 2003 when he was charged with attacking his father. He found Dunning insane at the time of that crime.

Based on his examination of Dunning in May 2008 for purposes of the restoration hearing Knape concluded that it was safe to release Dunning. Dunning was "much more insightful about the evolution of his mental illness. He was able to talk about the severity of his bipolar disorder, and how when he has stopped medication in the past, he has become very manic, very psychotic, and he expressed a great deal of remorse about the committing offense."

In Knape's opinion Dunning would continue taking his medication for several reasons. "[Dunning] has not been noncompliant with medications ever since he was committed for this crime. He has been consistently compliant. He has a great deal of motivation both within the state hospital as well as CONREP to continue his medication. And there have been no problems or indications that he has been noncompliant as evidenced by laboratory blood draws indicating that his Depakote levels have been therapeutic." Furthermore, Knape told the court, Dunning "has shown a great deal of motivation to remain on his medications. During my interview, he was extremely remorseful about his crime [and] the fact that he had not been on medications at the time of his crime and realizes how violent he was at the time of the crime. He's very remorseful and shameful about his behavior in the past. And I believe he is extremely

motivated to remain on his medications indefinitely." In addition Knape noted that, unlike most of his patients, Dunning "has not had any behavioral problems whatsoever in the CONREP program,"

Finally, Knape testified he believed that a social support system is "very important" in a patient sticking to his treatment program and that Dunning has such a support system. He mentioned in particular Alice Mertell, "a female friend that is extremely supportive[.] . . . She's been spending much time with him. She realizes what he's been through, and is willing to support him in the future in terms of emotional support."

C. Testimony of Dunning's Friends in Support of Restoration of Sanity

Four close friends of Dunning's testified that they would provide support if he is discharged from his commitment to make sure that he complies with his treatment program, including taking his medications.

Alice Mertell testified that she had known Dunning since they were in Junior High School. They began dating after Dunning's divorce. Currently they see each other "almost every weekend" and she "absolutely" intends to go on seeing him after he is released. Mertell stated that she would assist Dunning in maintaining his recovery by encouraging him and utilizing her experience as a drug and alcohol counselor to watch for any signs of decompensation.

John Carr, Philip Culotta and Debbe Blomdahl testified that they had known Dunning for decades and that they would do everything they could to make sure that upon his release Dunning continued to take his medications.

D. Testimony of Dunning in Support of His Restoration of Sanity

Dunning testified, "I'll never get off medication again." He knew this, he stated, because of his past experiences. "I don't ever want to injure anybody again," he told the court, "nor do I ever want to experience this incarceration again. The experience with my father was devastating, and I don't want anything like that to ever happen again."

Describing his psychiatric history, Dunning told the court that he first became "manic" in 1974. He was not diagnosed as bipolar at that time, however, but as schizophrenic and given medications for that illness. After he had the delusional episode in 1976 involving his wife he was properly diagnosed as bipolar and placed on Lithium. Dunning testified that he took the Lithium "religiously" for 20 years. He stopped taking the drug regularly in 1996 as the result of depression when his wife of 33 years told him she wanted a separation and he had to move out of the house. Quitting the medication led to his assault on his wife and a misdemeanor battery conviction. He lost his job in 1998 and with it his health insurance. He could not afford to pay for the Lithium which cost approximately $250 a month. For awhile his parents paid for his medications but at some point they stopped. In 2000 Dunning's wife divorced him, his mother died in 2001 and shortly thereafter he moved in with his 98-year-old father and cared for him "pretty much on a solitary basis for approximately 14 months."

In addition to taking his bipolar medication regularly, Dunning testified that he attends A.A. meetings five days a week, attends church every Sunday and, upon release, he intends to resume therapy with his previous psychiatrist or, if he is not available, with a different therapist.

Finally, Dunning told the court that when he is released from commitment he plans to rent an apartment in the San Fernando Valley near Ms. Mertell and his church. His income consists of Social Security, the rent from a Villa he owns and a pension. "Plenty for a single man to live off of," he observed.

E. Testimony of Diane Levy in Opposition to Restoration of Sanity

Levy, a psychiatric social worker employed by Gateways Satellite, who was Dunning's "primary therapist" at that institution, was the only witness to oppose Dunning's restoration of sanity. Levy testified that she had previously participated in six or seven restoration evaluations. She opposed Dunning's release from commitment because he had a history of not taking his Lithium, he lacked a "social network" to support him and he needed to be re-introduced into an unstructured environment "on a

gradual basis." In a written report to the court, Levy added that Dunning was not ready to be freed from commitment because he denied that he is an alcoholic and is "unable to acknowledge that drinking might be an early warning sign of emotional or mental problems."

F. The Trial Court's Ruling

The trial court concluded that Dunning had not proved by a preponderance of the evidence that he would continue taking his medication if he was released from a structured environment. The court stated that "[t]he three main areas that cause me concern are the history of medication on noncompliance [sic], the history of alcohol abuse and the role it played in the offense, and the issue as to the recovery plan."

III. ANALYSIS OF THE EVIDENCE

The People argue that the trial court reasonably found that Dunning would not continue to take his medications if released based on his past failure to take his medication, his history of alcohol abuse and the inadequacy of his recovery plan. We conclude those reasons are unsupported by the record.

A. Dunning's Past Failure to Take His Medication

Dunning's failure to take his medication in the past is a relevant consideration only to the extent that it tends to prove that he will not take his medication in the future. The issue is analogous to whether a prisoner's commitment offense is relevant in predicting his dangerousness if released on parole. In that context, our Supreme Court held that "the circumstances of the commitment offense . . . establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) An offense that is "temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur" is inadequate in and of itself to establish that the inmate remains a threat to public safety. (*Id*. at p. 1191.)

In this case, the evidence showed that on three occasions Dunning had stopped taking Lithium to control his bipolar disorder and that each time he wound up assaulting a family member.

The first incident occurred in the 1970's and therefore it is temporally too remote to establish in and of itself that Dunning remains a threat to public safety. (*In re Lawrence, supra,* 44 Cal.4th at p. 1191.)

Further, the undisputed evidence shows that the 1970's incident and the later incidents resulted from circumstances "unlikely to recur." As to the first incident, Dr. Sahgal testified that it is "very common" for patients with bipolar disorder not to take their medication early on in their treatment regimen. These patients have to learn "the hard way," Sahgal noted. The second and third incidents resulted from a combination of stressors including Dunning's wife divorcing him after more than 30 years of marriage, the loss of his long-time employment as a motion picture sound technician, dependence on his parents to pay for his medication, the death of his mother, and the 14-month task of caring for his father virtually around the clock.

Not only will these circumstances not recur, the undisputed evidence shows that Dunning has developed insights into his illness and strategies for managing it which will likely prevent future stressors from causing him to stop his medication.

In the past, Dunning was taking Lithium, an expensive drug which caused serious damage to his kidneys. Currently, Dunning is taking Depakote which is more affordable and has caused no adverse side effects. At least one of the times Dunning stopped taking Lithium was because he could not afford it. Currently no economic pressure exists for his stopping his medication. Likewise, because Depakote has caused him no adverse side effects, no health reasons would discourage him from taking his medication.

In the past, Dunning was not attending A.A. meetings. Currently, Dunning attends meetings five days a week.

In the past, Dunning lacked insight into his illness and the consequences of going off his medication. Currently, Dunning has "learned the hard way" that he needs to remain on his medicine.

On this last point, Dunning testified he was confident that he would continue taking his medication because: "I don't ever want to injure anybody again, nor do I ever want to experience this incarceration again. The experience with my father was devastating, and I don't want anything like that to ever happen again." Dr. Knape confirmed Dunning's new attitude toward his illness and his treatment. He testified that he believed that Dunning "is very happy with his current Depakote medication which is a different medication [than the Lithium]. I do believe that he realizes [the] level of his discontrol [sic] at the time of the crime and has much shame and remorse about it. And this whole process over the years of being in a locked hospital setting or in a court-mandated program, I think he is very much aware of his mental illness and the need for medication." Even Levy acknowledged that Dunning is "awar[e] of the severity of his symptoms of mental illness and that his medication is a major component of his being able to maintain stability." She further acknowledged: "[Dunning] is also very aware that his poor adherence to prescribed medication played a major role in his psychiatric decompensation and his committing offense."

Other factors present today which were not present in the past include Dunning's financial security, his close relationship with Ms. Mertell and the strong support of friends in his community.

Finally there is no evidence to support Levy's opinion that Dunning "needs [the] continuing structure" of the CONREP program "in order to make sure he's medication compliant."[4] The People admit that Levy could not identify any occasion in the more than five years of Dunning's commitment in which he had failed to take his medication. Levy acknowledged that the counselor's at Oxford Villa are supposed to watch Dunning

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4 To the contrary, Dr. Sahgal testified that Dunning not only does not need the continuing structure of the CONREP program, forcing Dunning to remain in the program would actually harm him psychologically. Sahgal testified, "I've always had the sense, and even more so now, that he is frankly too high functioning for some of those programs and that, if anything, they will grow over the years to frustrate him. So I think that a continuation of his trajectory at CONREP would be disadvantageous for him."

take his medicine but she did not know whether they actually did so.[5] Indeed, it is undisputed that random drug tests show that Dunning has been taking his prescribed medicine. Furthermore, Levy conceded that Dunning has shown the ability to function independently, taking the bus to and from Oxford Villa on time for A.A. meetings and therapy at Gateways, visiting Ms. Mertell in the San Fernando Valley on the weekends and taking his medication on the weekends when he is with Ms. Mertell although no one from Gateways or Oxford Villa is monitoring him.

Although the trial court is not required to follow the unanimous opinions of the two court appointed forensic psychiatrists, neither is it permitted to arbitrarily disregard those opinions. (*People v. Cross*, *supra*, 127 Cal.App.4th at p. 73.) The record in this case reveals no principled reason to accept Levy's opinion that Dunning needs further commitment in the CONREP program to make sure that he will keep taking his medications over Sahgal's and Knape's explanations of why Dunning does not need continued commitment.

The People argue that the court could reasonably accept Levy's opinion over Sahgal's and Knape's because she had the most contact with him and was in the best position to observe him. This argument fails because Levy's opinion that Dunning would not take his medication if released was not based on her observations of Dunning. On the contrary, Levy's observations of Dunning—his attendance at therapy and A.A. meetings, his faithfully taking his medication, his negative drug and alcohol tests, and his ability to function outside the walls of an institution—all supported a finding that Dunning was not a danger to society. Levy's only objection to releasing Dunning from commitment was based on her generalized belief that he would "benefit" from another year in the CONREP program. However, as Dr. Sahgal pointed out, the issue is not whether Dunning's mental illness would "benefit" from continued treatment at CONREP, but whether Dunning's mental illness represents a substantial risk of harm to others should he

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5 Dunning testified without contradiction that when he was given his medication at Oxford Villa he consumed it in his room without supervision.

be released from commitment. On this issue Doctors Sahgal and Knape were unanimous in their belief that Dunning posed a very low risk and Levy offered no evidence to the contrary.

B. Dunning's History of Alcohol Abuse

The court stated that it was "not satisfied that Mr. Dunning sufficiently at this point understands and appreciates the triggers, the alcohol abuse and the role that played in the offense." It noted that Dunning stated he did not consider himself an alcoholic because he does not crave alcohol but the record shows that Dunning has an "extensive history of alcohol abuse, and it was a factor in the offense admittedly leading up to the [the assault on his father]."

The undisputed evidence, however, showed that Dunning starts drinking *after* he stops taking his medications, not before. In other words, it is not drinking alcohol that triggers Dunning's failure to take his medication; it is not taking his medication that triggers his drinking. Therefore whether he considered himself an alcoholic had no bearing on the issue of whether he would continue to take his medication.

C. Dunning's Recovery Plan

The court found that Dunning's recovery plan was inadequate because it did not "include the identification of early warning signs of emotional and environmental triggers for symptoms of mental illness, substance abuse and impulsive behavior." The court's finding is not supported by the evidence. The record shows that Dunning was well aware that if he stopped taking his medication he would start drinking and his manic syndrome would return. His recovery plan was simple: keep taking the medication. As we discussed above, the evidence was overwhelming that he would do so. Further, he testified that he intended to see a psychiatrist upon his release to help him stay on plan.

DISPOSITION

The order denying Dunning's application for release from commitment is reversed and the cause is remanded to the trial court with directions to grant the application and to proceed thereafter in accordance with law.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.